UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

D. R. HORTON, INC.	)	
and	)	**Case 12-CA-25764**
MICHAEL CUDA, an Individual	)	

BRIEF OF RESPONDENT'S IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

Respondent D.R. Horton, Inc. ("Company" or "D.R. Horton") has taken the following exceptions to the Administrative Law Judge's findings:

(1) The Company excepts to ALJ's statement that the issue before him on which he found against the Company is whether the Company's arbitration agreements "lead employees reasonably to believe that they are barred or restricted from filing charges with the NLRB, thereby violating Section 8(a)(4) and (1)" (ALJD p.2, lines 8-10);

(2) The Company excepts to the ALJ's failure to describe fully and accurately the provisions of the arbitration agreement that are relevant to the question whether the Company's agreement restricts employee access to the Board and that the Company has violated Section 8(a)(4) and (1) of the Act by requiring employees to sign the agreement;

(3) The Company excepts to the ALJ's failure to find that there is no evidence that the Company in fact ever took the position or disputed the right of employees to seek access to administrative agencies including the Board or ever took adverse action of any kind against employees for doing so, including the individual Charging Party in this case (see Tr. 36-37), notwithstanding the alleged unlawful scope of the arbitration agreement;

(4) The Company excepts to the ALJ's reliance on *U-Haul Co. of California*, 347 N.L.R.B. 375 (2006) and *Bill's Electric*, 350 N.L.R.B. 292 (2007). See ALJD at p.5 line 28 through p.6 line 11.

(5) The Company excepts to the ALJ's finding (ALJD p.6 lines 15-18) that employees would not understand that the arbitration agreement did not prevent them from filing charges with the Board and that the language of the agreement "would lead employees reasonably to believe they could not file charges with the Board;"

(6) The Company excepts to the ALJ's implicit finding (ALJD 20-24) that the language of the arbitration agreement may be ambiguous but that even so and if not followed the agreement still violates the Act;

(7) The Company excepts to the ALJ's conclusions of law as erroneous and unsupported in fact and law (ALJD p.6 lines 26-27, 34-38);

(8) The Company excepts to the ALJ's remedy and order (ALJD p.6 lines 40-43, p.7 lines 3-42, p. 8 lines 1-5) in their entirety; and

(9) The Company excepts to the ALJ's conclusions, remedy, and order because it contravenes the Federal Arbitration Act and cannot be enforced by this proceeding.

It is the Company's purpose to focus the Board's attention on the violations the ALJ found with respect to the allegation that the Company's mandatory arbitration agreement violates Section 8(a)(4) and (1) of the Act. The Company believes that the ALJ's findings in that regard are unsupported by the record, and contrary to law.

FACTS

The arbitration agreement at issue is entitled "Mutual Arbitration Agreement" and is in evidence as Joint Exh. 2. It is stipulated that the Company has used the agreement since 2006 and requires its employees to sign the agreement as a condition of employment (Joint Exh. 1, para. 2). When the agreement was first presented to employees, none refused to sign it (Tr. 29). The agreement by its terms binds both the employee and Company and is to "avoid the burdens and delays associated with court actions...". (Joint Exh. 2 at preamble). The Agreement states that it applies to employees' "individual claims" (Joint Exh. 1, para. 6).

The arbitration agreement does not mention the NLRB. Company managers are instructed to tell employees who express uncertainty about the scope of the Agreement that they

would "still be able to go to the EEOC or similar agency with a complaint" and that "the arbitration policy applies to any relief you may seek through the courts" (Employer Exh. 1, p. 1).

Under the Agreement the costs "unique to arbitration" are borne by the Company except that in cases initiated by an employee, that employee must contribute an amount equal to "the filing fee to initiate the claim in the court of general jurisdiction in the state in which Employee is or was last employed by the Company" (Joint Exh. 2 at para. 7). The Agreement recites that in signing the same "the Company and Employee voluntarily waive all rights to trial in court before a judge or jury on all claims between them" in favor of submitting such claims to arbitration. (*Id.* at para. 1). The selection of the arbitrator is to be by mutual agreement, and administrative details are to be handled according to the National Rules for the Resolution of Employment Disputes of the American Arbitration Association ("AAA") (*Id.* at para. 4). Certain matters are expressly excluded from the agreement, including claims "for declaratory or injunctive relief" relating to a confidentiality or non-competition matters or a "similar obligation." (*Id.* at para. 2).

Paragraph 6 of the arbitration agreement (Joint Exh.2) states in full that:

> The parties intend that this Agreement will operate to allow them to resolve any disputes between them as quickly as possible. Thus, the arbitrator will not have the authority to consolidate the claims of other employees into a proceeding originally filed by either the Company or the Employee. The arbitrator may hear only Employee's individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding.

When the unfair labor practice charge herein was filed with the Board by Michael Cuda, the Company did not take the position that the charge was subject to the Mutual Arbitration Agreement and not properly before the Board, nor has the Company taken adverse action against Cuda or other employees who filed charges. Similarly, there is undisputed testimony that

Company employees have sought recourse from other federal and state administrative agencies to resolve employment issues since the Company began using the Mutual Arbitration Agreement in 2006 and that, consistent with the Company's original intent under the Agreement, the Company has taken no adverse action against such employees or raised the agreement as a bar to employees filing administrative claims (Tr. 36-37).

Concerning the provisions of paragraph 6 of the Mutual Arbitration Agreement quoted above, Michael Cuda and other Company employees have instituted individual claims against the Company for unpaid overtime under federal wage and hour laws and invoked arbitration under the Agreement, but have sought to litigate those arbitrations on a class or collective action basis in disregard of paragraph 6 (Joint Exh. 3 through 11). The Company has taken the position before the AAA that the Company is not required to litigate on a class or collective action basis and objects to doing so (*Id.*), citing the language of paragraph 6. Although this is the Company's litigation position, there is no evidence that the Company has taken any adverse employment action against any employee who has sought to litigate in arbitration on a class or collective action basis. Rather, the Company has simply resisted having to arbitrate on such a basis while expressing its readiness to proceed on an individual basis as the Mutual Arbitration Agreement provides.

ARGUMENT

A. The Company Did Not Violate Sections 8(a)(4) & (1) of the Act as Concluded by the ALJ

The ALJ concluded that "the language of the mandatory arbitration agreement, on its face, would lead employees reasonably to believe they could not file charges with the Board." (ALJD p.6, lines 16-18). The Company disputes this finding and takes the following exceptions to the ALJ's basis for his conclusion.

1. The ALJ failed to consider all relevant language in the Mutual Arbitration Agreement

In reaching his decision in this case, the ALJ improperly failed to consider all of the relevant language of the Mutual Arbitration Agreement that served as the basis of the General Counsel's Complaint. Finders of fact who are charged with determining the purported chilling effect of rules (and other text) that do not explicitly limit employee protected activity must take into consideration the context in which the text is written. As one ALJ stated in *Pleasant Travel Services, Inc.*, 2010 WL 3982203 (N.L.R.B. Div. of Judges) *citing Guardsmark v. NLRB*, 475 F.3d 369, 375-376 (D.C. Cir. 2007):

> In cases where the rules do not explicitly restrict Section 7 activity, the General Counsel must establish by a preponderance of the evidence that...employees would reasonably construe the rule to prohibit Section 7 activity....In all cases, the Board requires the trial judge to give the rule a reasonable reading, refrain from reading particular phrases in isolation, and avoid improper presumptions about interference with employee rights.

See also S.T.A.R., Inc., 347 N.L.R.B. 82, 83 n.3 (2006) ("When determining a rule's reasonable constructions, the Board must refrain from reading particular phrases in isolation and must not presume improper interference with employee rights); *Lutheran Heritage Village*, 343 N.L.R.B. 646 (2004) (In determining whether a challenged rule is unlawful, the Board must...give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights). The Board has long applied the universally accepted contract principle that "[t]here can be no question but that in ascertaining the meaning of any provision of a contract, that provision should be read in the light of the contract as a whole, not in isolation, and that each provision, if possible, should be interpreted so as to harmonize with the other provisions." *Filtron Co., Inc.*, 134 N.L.R..B. 1691, 1700 (1961)

Here, the ALJ only focused on one short paragraph of a two page agreement in making his decision. There can be little doubt the small portion relied upon by the ALJ was considered in isolation of the full agreement and that he improperly failed to acknowledge and interpret the contract in the context of all provisions.

2. *The ALJ failed to consider the Company's implementation of the Mutual Arbitration Agreement*

By simply declaring that the Mutual Arbitration Agreement, on its face, "would lead employees reasonably to believe they could not file charges with the Board" the ALJ has been allowed to declare that an "objective" finding of fact has been made that the Act has been violated. However, such a finding for a rule that does not explicitly restrict Section 7 activity requires that the determination be "established by a preponderance of the evidence." *Guardsmark v. NLRB*, 475 F.3d 369, 375-376 (D.C. Cir. 2007). The fact is, however, no evidence exists to support the ALJ's conclusion and the ALJ makes no attempt to explain the textual basis for his conclusion.

Guardsmark instructs that "the Board focuses on the text" when analyzing a non-explicitly restrictive rule and that, as long as the textual analysis is "reasonably defensible" and "adequately explained, the Board need not rely on evidence of employee interpretation...to determine that a company rule violates Section 8 of the Act." *Cintas Corp. v. NLRB*, 482 F.3d 463 (D.C. Cir. 2007).

If the ALJ wishes to bypass any consideration of real evidence discussing the actual implementation and common understanding of the agreement, and base a decision solely on the face of the language in the agreement, the *Cintas Corp.* decision instructs that he must adequately explain how the language itself violates the Act. *Id.*

In reaching his decision here, the ALJ undertook no textual analysis. He simply recited texts from other cases containing what the Board found to be unlawful mandatory arbitration agreements. Nowhere in the decision was any of the language of the Mutual Arbitration Agreement discussed in conjunction with, compared, or contrasted to the language found to be unlawful in those cited cases. Therefore, the ALJ did not "adequately explain[]" what components of the language of the Mutual Arbitration Agreement, as applied to the precedent relied upon, were in violation of the Act.

Because the ALJ did not actually make use of any of the text of the Mutual Arbitration Agreement to explain his finding, there is no basis for an "objective" finding "established by the preponderance of the evidence." The ALJ simply declares the result and provides no explanation for it. Accordingly, by failing to make a truly objective finding based on the text, the ALJ was in error in failing to consider the Company's well-established record showing a complete lack of enforcement or even contemplation that the Mutual Arbitration could or would be utilized to restrict employee access to the Board's processes.

As noted earlier in the Facts section of this brief, the Mutual Arbitration Agreement recites that it is to "avoid the burdens and delays associated with court actions" and that the parties "voluntarily waive all rights to trial in court before a judge or jury on all claims between them." Managers were instructed to advise any employees who have questions regarding the scope of the Agreement that employees would "still be able to go to the EEOC or similar agency with a complaint" and that the arbitration policy "applies to any relief [they] may seek through the courts." The Agreement nowhere states that it applies to the NLRB. There was no evidence presented at the hearing that the Company has taken the position that the Agreement supplants employees' rights to go to the NLRB. In fact, the evidence is to the contrary, including that the

very NLRB charges filed by Michael Cuda and other employees were handled before the NLRB with no contention by the Company that the charges belonged instead in the arbitration procedure covered by the Agreement. Moreover, the plain language of the Agreement excludes NLRA claims, for such claims are administrative (not judicial) and entail equitable rather than legal damages and relief. The ALJ improperly failed to consider this evidence.

3. The ALJ failed to recognize that the cases upon which he relied were distinguishable from the facts of the instant case

Although the ALJ cited two Board cases that outlined some similar facts to the present case regarding arbitration agreements, the ALJ failed to recognize clearly distinguishable elements of those cases as applied to the facts of this case. In *U-Haul Company of California*, 347 N.L.R.B. 375 (2006), the Board found that a mandatory arbitration policy which covered certain enumerated non-NLRA matters as well as "any other legal or equitable claims and causes of action recognized by local, state or federal law or regulations" violated Section 8(a)(4) Id. at 377. The Board found that a reasonable employee might construe such language as applying to his or her right to seek redress from the Board, which of course enforces "federal law." No such language appears in the Mutual Arbitration Agreement here between the Company and its employees. Rather, the Mutual Arbitration Agreement is quite clear that its purpose is to avoid "burdens and delays associated with court actions" and that by signing the Agreement establishing an arbitral remedy, an employee is waiving "all rights to trial in court before a judge or jury..."-- matters which clearly exclude the NLRB. As the Board has stated, "the Board is not a court of general jurisdiction. We do not decide cases that are pursued through the state court systems."[1] The Board is, as the United States Supreme Court stated in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 242 (1959) "a centralized administrative agency,

[1] *Bill Johnson's Restaurants, Inc.*, 290 N.L.R.B. 29, 32 n.16 (1988).

armed with its own procedures" that "Congress has entrusted administration of labor policy of the Nation." It follows then that the language in the agreement, as it relates to trial in court, cannot reasonably be read to preclude access to the Board because the Board is not a court.

When the language in the instant agreement is considered in the further context that the Mutual Arbitration Agreement was not "promulgated in response to union activity" (*U-Haul*, 347 N.L.R.B. at 377) and that, in fact, union issues are not and never have been any part of this case, the inference that employees would not reasonably view the Agreement as NLRB-related is quite strong.

The ALJ also cited *Bill's Electric, Inc.*, 350 N.L.R.B. 292, 296 (2007) as support for his decision. (ALJD p. 6 para 5). That case is also clearly distinguishable from the facts in this case. In *Bill's Electric*, 350 N.L.R.B. at 296, the Board found a mandatory arbitration agreement violated the Act based on the ALJ's finding that the arbitration agreement would be read by "affected applicants" as restricting access to the Board's processes. The agreement in question was integrated as part of an employee application after an attempt by a union to have salts apply to work for the employer. *Id.* at 296. When the employer failed to hire the salts, unfair labor practice (ULP) charges were filed. *Id.* In response to the ULP charges, the employer sent letters to the salts (applicants) telling them that any dispute would be subject to the arbitration agreement. *Id.* The Board stated that the judge found the arbitration policy's language to be unlawful based on "the application and letters, read together" and thereby the inference that the employer "clearly sought to interfere with employees' access to the Board." *Id.* In effect, the agreement was "promulgated in response to union activity" as discussed in *U-Haul*, 347 N.L.R.B. at 377 and used to preclude access to the Board.

Additionally, the *Bill's Electric* arbitration agreement expressly interfered with employee use of the "NLRB" because the language forced any applicant seeking to use the Board's process to "bear the costs of any litigation to compel compliance with that process." *Bill's Electric*, 350 N.L.R.B. at 296.

Nothing in the Mandatory Arbitration Agreement even comes close to the facts of those in *Bill's Electric*. As noted above, the agreement was not instituted by the Company as a response to any union activity and the agreement certainly did not expressly interfere with the Board's processes. Accordingly, the ALJ improperly sought to link the Mutual Arbitration Agreement to the facts and circumstances of *Bill's Electric* and *U-Haul* while failing to distinguish those cases. *Bill's Electric, Inc.*, 350 N.L.R.B. 292 (2007); *U-Haul Company of California*, 347 N.L.R.B. 375 (2006).

4. The ALJ improperly interpreted the Mutual Arbitration Agreement to contain a meaning that was not at all present in the agreement

The ALJ improperly interpreted the Mutual Arbitration Agreement to contain meaning that was not present in the agreement. The ALJ took an agreement with express terms framing its parameters, and read something into the agreement that is not there. No where in the agreement is there any mention of the NLRB, the Board, or any other administrative body. The ALJ did exactly what *S.T.A.R., Inc. and, Lutheran Heritage Village* cautioned and instructed against, he created an "improper presumption about interference with employee rights." *See S.T.A.R., Inc.*, 347 N.L.R.B. at fn. 3; *Lutheran Heritage Village*, 343 N.L.R.B. at 646. Precedent establishes that the Board (and other finders of fact in proceeding interpreting the Act) should be restrained in interpreting whether a text has a chilling effect on employees' protected activity. The D.C. Circuit has clearly held that the Board is not entitled to take linguistic liberties when interpreting certain text to be facially unlawful without having some evidence to back up the

finding. As the Court stated in *Guardsmark, LLC v. NLRB*, 475 F.3d 369 (D.C. Cir. 2007), "the NLRB may not cavalierly declare policies to be facially invalid without any supporting evidence." *examining Adtranz ABB Daimler-Benz Transportation v. NLRB*, 253 F.3d 19, 29 (D.C. Cir. 2001). Further, the court held in that case, that only the Board's interpretation through "fanciful speculation" could lead to a finding that a work rule would "chill protected activity" where the rule did not otherwise "explicitly" prohibit protected activity. *See Guardsmark v. NLRB*, 475 F.3d 369, 375-376 (D.C. Cir. 2007) *examining Aroostook County Regional Ophthalmology Center v. NLRB*, 81 F.3d 209,213 (D.C. Cir. 1996). Similarly, the ALJ's conclusion in the instant matter simply relies on fanciful speculation and is not factually or objectively based.

Furthermore, the ALJ's conclusion declares that a "reasonable employee" would understand the language of the signed Mutual Arbitration Agreement to mean that he or she had waived access to the Board. The ALJ's conclusion amounts to a defacto waiver. This reasoning is a dramatic departure from the Board's longstanding standard for interpreting the force and effect of waivers in contracts. The Board has long held that, for a contractual a waiver to be upheld, that waiver must be "clear and unmistakable." *See e.g. Dorsey Trailers,Inc.*, 327 N.L.R.B. 835 (1999). Recently, the United States Supreme Court upheld this standard when it stated that in order for an employee to waive the right to bring an individual age discrimination claim under the Age Discrimination in Employement Act (ADEA) pursuant to a collective bargaining agreement, the agreement must "clearly and unmistakably" indicate waiver. *14 Penn Plaza, LLC v. Pyett*, 556 U.S. __, 129 S.Ct. 1456 (2009). Moreover, courts have held that the party seeking to establish waiver bears the substantial burden of showing that the waiver was clear and unmistakable. *See N.L.R.B. v. New York Telephone Co.*, 930 F.2d 1009, 1011 (2d

Cir.1991) ("the party asserting waiver bears the weighty burden of establishing that a 'clear and unmistakable' waiver has occurred").

Here, nothing in the scant language cited and relied upon by the ALJ indicates that employees clearly and unmistakably waived their right to the Board's processes (which would be clearly and indisputably unlawful). To the contrary, nothing in the Mutual Arbitration Agreement even mentions the Board or any processes and procedures that are used by the Board. Based on the Board's longstanding interpretation of the sufficiency of a contractual waiver, the General Counsel failed to the meet the clear and unmistakable threshold. Accordingly, the ALJ improperly read language into the agreement that simply was not a part of terms of the agreement or even any party's understanding of the agreement.

5. The ALJ's decision contravenes the Federal Arbitration Act and cannot be enforced by this proceeding

The ALJ concluded that "the language of the mandatory arbitration agreement, on its face, would lead employees reasonably to believe they could not file charges with the Board. (ALJD p.6, lines 16-18). The Company disputes the ALJ's decision in that it improperly contravenes the Federal Arbitration Act and that the decision can therefore not be enforced in this proceeding. Accordingly, the Company takes exception based on the following.

a. The Federal Arbitration Act.

The Federal Arbitration Act ("FAA") provides that:

> [a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exists at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (emphasis added). The United States Supreme Court has noted that Congress enacted the FAA to "reverse the long-standing judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (*citing Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-220 (1985)). Notwithstanding the historical skepticism of binding arbitration as a dispute mechanism, the Supreme Court recognized that the FAA signaled a major change in course, establishing a strong federal policy favoring arbitration as a dispute resolution mechanism. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001); *Gilmer*, 500 U.S. at 25.

To determine whether the parties agreed to arbitrate, it is appropriate to resort to state law principles governing contract formation, rather than federal law. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). In applying such principles, the Supreme Court has emphasized that "it should be kept in mind that 'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.'" *Gilmer*, 500 U.S. at 26 (*quoting Moses H. Cone Memorial Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983)). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or a like defense to arbitrability." *Moses H. Cone*, 460 U.S. 1 at 24-25.

b. The General Counsel's and ALJ's Positions Are Flatly Contrary to the Express Language of the FAA.

The ALJ concluded that "[b]y maintaining a mandatory arbitration provision that employees reasonably could believe bars or restricts their right to file charges with the National

Labor Relations Board, the Respondent has engaged in unfair labor practices. . . ." (ALJD p.6 para 16-18). However, as made clear above, the FAA calls for arbitration agreements to be analyzed as ordinary contracts and only as ordinary contracts, rather than parsed and nit-picked according to an administrative agency's own idiosyncratic requirements. The concept of what "employees reasonably could believe" is at odds with the straightforward approach to contract interpretation mandated by the FAA, and it imposes precisely the sort of extra-contractual hurdle to enforcement that Congress decisively rejected in enacting the FAA. The General Counsel seeks to take this case back to the state of the law prior to such enactment. But neither the General Counsel nor the ALJ cited authority for this clear departure from the expressed will of Congress, and there is none. The "what employees reasonably could believe" standard cannot be applied to arbitration agreements, and must be abandoned as a rule of decision in this case.

In disregarding the FAA's standards for interpreting arbitration agreements, the ALJ characterized Respondent's agreements as "mandatory arbitration policies" and made passing reference to the fact that Respondent has an "unorganized workforce." (ALJD p. 5 para. 28 & 29) Neither of these characterizations changes anything. The record reflects that the arbitration provisions at issue were signed and duly executed by Respondent's employees. Under the FAA, any defects or irregularities in the signing or execution of these agreements is a matter for straightforward analysis under the contract law principles of the relevant state(s), including, as applicable, legal doctrines related to "adhesion contracts," consideration and various grounds for avoiding contractual obligations. The ALJ cannot escape the reach of the FAA merely by characterizing the agreements as "mandatory policies." The fact is that the dispute in this case is over arbitration agreements, not policies.

It is likewise irrelevant that the agreements were executed by members of an "unorganized workforce." Whatever the current trend in Board jurisprudence may be with respect to a double standard for enforcing contractual promises in organized and unorganized workplaces, the FAA does not permit the Board to impose special heightened requirements based on the presence or absence of union representation. Once again, such a rule is exactly the sort of extra-contractual interference with arbitration agreements that the FAA expressly rejected. The statute makes clear that punishing the non-union employer with heightened standards for enforcing arbitration agreements is not an option.

The ALJ cites *U-Haul of California*, 347 N.L.R.B. 375 (2006) and *Bills Electric, Inc.*, 350 N.L.R.B. 292, 296 (2007), in support of its finding that Respondent's arbitration agreements violate Sections 8(a)(1) and 8(a)(4). Apart from other distinguishing factors noted above neither Board decision even attempted to reconcile the "what employees reasonably could believe" standard with the FAA. Notably, the ALJ does not cite any Supreme Court authority for the proposition that the Board may interfere with thousands of individual contracts based on a rule that flatly contradicts congressional intent as set forth in the text of a federal statute. *U-Haul of California* and *Bill's Electric* offer no basis for ignoring the FAA.

For the reasons explained above, the ALJ simply does not have the authority to order Respondent to "[r]escind or revise the mutual arbitration agreement . . .", as the Decision purports to do. (ALJD p.7 para. 18) The only grounds for rescinding or revising an arbitration agreement are those applicable to contracts generally, according to the state law principles of the applicable jurisdiction. 9 U.S.C. § 2; *Gilmer*. The ALJ overstepped his and the Board's authority, and his Decision must be reversed.

CONCLUSION

For all of the foregoing reasons, the decision and recommended Order of the Administrative Law Judge should not be upheld by the Board to the extent outlined by the Company's Exceptions and this Supporting Brief, and the complaint against D.R. Horton, Inc. should be dismissed.

Respectfully submitted,

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Dated: March 14, 2010

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CERTIFICATE OF SERVICE

I certify that the foregoing document was served by electronic mail on John F. King, Esq., National Labor Relations Board Region 12, 51 S.W. First Avenue, Suite 1320, Miami, Florida 33130, john.king@nlrb.gov., on March 14, 2011.

Bernard P. Jeweler